Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services	CC Docket No. 01-337

Comments of the Information Technology Association of America

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SUMMARY

A Distinct Market Exists for Wholesale Broadband Mass-Market Telecommunications Services

The Commission should recognize the existence of a distinct market for broadband mass-market telecommunications services – such as DSL – provided to ISPs that serve residential and small business customers. The broadband services purchased by ISPs differ significantly from the broadband services typically bought by residential and small business customers. While ISPs generally purchase "pure" broadband telecommunications services, retail customers generally purchase broadband telecommunications service bundled with Internet access service. In addition, ISPs – unlike retail customers – typically purchase mass-market broadband telecommunications services in bulk quantities, often at discount prices that reflect the quantity purchased.

ILECs Have Significant Market Power in the Market for Wholesale Mass-Market Broadband Telecommunications Services

There is no question that the ILECs are the dominant providers of DSL services, with an estimated 93 percent market share. The ILECs also are major participants in the "down-stream" market for broadband mass-market Internet access services. Therefore, the ILECs have both the ability and the incentive to provide DSL services to non-affiliated ISPs on unreasonable and discriminatory prices, terms, and conditions, thereby subjecting rival ISPs to a classic "price squeeze."

The ILECs' ability to act anti-competitively is not constrained by intra-modal competition. At present, only about seven percent of all DSL lines are provided by a CLEC. Moreover, the existing regulatory regime – which has made even the current limited amount of competition possible – may not survive. The ILECs have mounted a ferocious attack in the

courts on the Commission's *Collocation* and *Line Sharing Orders.* The Commission is also considering a range of changes to its rules, which would make it far more difficult for CLECs to obtain unbundled network elements from the ILECs.

Nor is the ILECs' market power constrained by inter-modal competition. Cable systems are under no legal obligation to – and, in practice, do not – provide wholesale broadband transport services to ISPs. At most, an ISP may be able to negotiate a commercial agreement to "partner" with the cable system operator. Other delivery platforms, such as satellite and wireless, are still in the earliest stages of deployment.

The Commission also cannot rely on the pro-competitive safeguards adopted in the *Computer Inquiries* to prevent the ILECs from using their market power to thwart competition in the broadband information services market. Over the years, the Commission has taken a number of steps that have weakened the effectiveness of the *Computer Rules* as a means of constraining the BOCs' ability to leverage their market power in the telecommunications market in a manner that can impede competition in the information services market. These include the elimination of structural separation, the dilution of the Open Network Architecture requirement, the elimination of the requirement that the BOCs obtain prior approval for Comparably Efficient Interconnection Plans, and the lifting of the prohibition of dominant carriers bundling telecommunications services with information services and customer premises equipment. In two separate proceedings, the Commission is now considering further reducing or eliminating entirely many of the remaining *Computer Rules* safeguards.

The Commission Should Not Declare the ILECs Non-Dominant in the Provision of Wholesale Mass-Market Broadband Telecommunications Services

ITAA has consistently supported the elimination (or non-imposition) of regulation in situations in which competitive market forces are operating effectively. However, because the

ILECs continue to have the ability and incentive to discriminate in the provision of wholesale mass-market broadband telecommunications services, it would not be appropriate to reclassify them as non-dominant or to eliminate existing regulations applicable to these services. To the contrary, the Commission should enforce existing regulations – especially the BOCs' still-effective *Computer II* obligation to separate the provision of intra-LATA telecommunications services (both narrowband and broadband) from the provision of information services – while taking further action to promote broadband competition.

If the Commission chooses to deregulate the ILECs' broadband telecommunications services, however, it should, at the very least, require the ILECs to establish structurally separate "advanced services" affiliates that would be required to access the ILECs' local network on the same prices, terms, and conditions as unaffiliated CLECs that seek to provide competitive broadband telecommunications services. The Commission has previously recognized that requiring the ILECs to provide "advanced telecommunications services" through a separate affiliate can be an effective means to deter competitive abuse. In order to be effective, the Commission should apply the strict separation rules specified by Congress in Section 272 of the Communications Act.

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Comments of the Information Technology Association of America

The Information Technology Association of America ("ITAA") hereby files these comments in response to the Commission's Notice of Proposed Rulemaking ("*Notice*") in the above-captioned proceeding.[1] ITAA shares the Commission's commitment to prompting the deployment of broadband telecommunications facilities and services. However, competitive forces have resulted in the deployment of significant broadband capacity in most geographic areas. Indeed, in many locations there is significantly more broadband supply than demand. There is, therefore, little need for the Commission to dismantle existing regulatory provisions designed to prevent anti-competitive abuse in order to create "incentives" for Incumbent Local Exchange Carrier ("ILEC") broadband deployment. Rather, the Commission's principal goal should be to continue to foster competition, while taking actions that will spur consumer demand for broadband services.

[1] *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, Notice of Proposed Rulemaking, CC Docket No. 01-337, FCC 01-360 (rel. Dec. 20, 2001) ("*Notice*").

INTRODUCTION

In these comments, ITAA focuses on a critically important market: the market for the provision of wholesale mass-market broadband telecommunications services[2] – especially Digital Subscriber Line ("DSL") services – that Internet Service Providers ("ISPs") use to provide broadband Internet access services to residential and small business subscribers ("wholesale mass-market broadband telecommunications services").[3] As demonstrated below, incumbent local exchange carriers continue to exercise significant market power in the wholesale broadband mass-market telecommunications services market. Because the ILECs are also significant participants in the broadband Internet access market, they have a clear incentive to discriminate against non-affiliated ISPs in the provision of these wholesale services. Therefore, it would not be appropriate to reclassify the ILECs as non-dominant or to eliminate existing regulations applicable to these services. Rather, the Commission should preserve safeguards designed to deter the ILECs from using their market power to distort competition in the information services market while continuing to take vigorous actions to promote competition.

STATEMENT OF INTEREST

ITAA is the principal trade association of the computer software and services industry. ITAA has 500 member companies located throughout the United States – ranging from major multinational corporations to small, locally-based enterprises. ITAA's members include a

[2] The fact that ITAA has chosen to limit its comments to the market for wholesale mass-market broadband telecommunications services should not be construed as support for elimination of regulatory safeguards applicable to the ILECs' participation in other segments of the market for broadband telecommunications services.

[3] ISPs use these telecommunications services to provide a wide range of value-added applications, such as: website access, web search engines, e-mail, instant messaging, streaming audio and video. Many ISPs also provide proprietary content, web content hosting, IP addresses, domain name registration, technical assistance, and other services.

significant number of information service providers that have always been (and remain) critically dependent on telecommunications services provided by ILECs. Therefore, during the last two decades, ITAA (and its predecessor, ADAPSO) has participated actively in Commission proceedings governing the obligations of the BOCs and other ILECs to offer the basic telecommunications services necessary to provide information services on a just, reasonable, and non-discriminatory basis. These proceedings include all three of the *Computer Inquiries* and the *Open Network Architecture ("ONA"), Local Competition,* and *Advanced Services* proceedings.

I. A DISTINCT MARKET EXISTS FOR WHOLESALE MASS-MARKET BROADBAND TELECOMMUNICATIONS SERVICES

In the *Notice*, the Commission seeks comment on "whether, within the general product market[] for . . . mass-market customers, [it] should distinguish between retail markets and wholesale markets."[4] Consistent with established precedent, the Commission should recognize the existence of a separate market for wholesale broadband services, such as DSL-based services, that an ILEC provides to an ISP for use in providing a broadband information service to residential and small business customers.

The Commission's approach to market definition is well established. In seeking to define a relevant market, the Commission will consider "all reasonably substitutable services" to be in the same market.[5] The Commission has typically chosen to define broad telecommunications service markets, and has not previously defined separate wholesale markets. However, the agency has identified three situations that would justify defining a narrower relevant product market: (1) where a class of customer seeks to purchase different types of telecommunications

[4] *Notice* ¶ 24.

[5] *Id.* ¶ 18; *see generally Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Service Area,* 12 FCC Rcd 15756, 15773-76 (1997) (describing the Commission's market definition methodology).

services than other classes of customers;[6] (2) where a class of customer purchases a type of telecommunications service in significantly greater volume than other classes of customers;[7] and (3) where there is "credible evidence suggesting that there could be a lack of competitive performance with respect to a particular service or group of services."[8]

In the present case, defining a separate wholesale mass-market broadband telecommunications services market is justified under all three criteria. The broadband services purchased by ISPs differ significantly from the broadband services typically bought by residential and small business customers. ISPs generally purchase "pure" broadband telecommunications services – typically ADSL – from ILECs. Retail customers, by contrast, rarely purchase a "stand-alone" broadband service. Rather, they generally purchase broadband telecommunications service bundled with Internet access service.[9] In addition, ISPs – unlike retail customers – typically purchase mass-market broadband telecommunications services in bulk quantities, often at discount prices that reflect the quantity purchased. Finally, as discussed

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[6] *See Application of WorldCom, Inc. and MCI Communications Corp. for Transfer of Control of MCI Communications Corp. to WorldCom, Inc.*, 13 FCC Rcd 18025, 18041 (1998) (*"WorldCom/MCI Merger Order"*); *see also Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area,* 12 FCC Rcd 15756, 15776-77 (1997) (*"LEC Interexchange Non-Dominance Order"*) (Defining separate products markets may be appropriate when a carrier targets particular types of customers.).

[7] *See WorldCom/MCI Merger Order,* 13 FCC Rcd at 18041.

[8] *LEC Interexchange Non-Dominance Order,* 12 FCC Rcd at 15782.

[9] In many cases, the ILECs do not even offer a stand-alone broadband telecommunications service to their residential and small business customers. *See, e.g., Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in Arkansas and Missouri,* 16 FCC Rcd 20719, 20737-38 (2001) (*"SBA-Arkansas/Missouri Section 271 Order"*); *id.* at 20884-85 (separate Statement of Commissioner Abernathy). Rather, the *only* way in which the ILECs offer broadband transport to these customers is as part of a bundled package. The Commission, however, should not identify a separate retail *telecommunications* market for "broadband services sold . . . as part of a bundled service package," such as packages combining DSL transport with Internet access. *Notice* ¶ 24. When an ILEC offers retail customers a broadband telecommunication service, such as DSL, bundled with an information service, such as Internet access, the resulting offering is – and should remain – an unregulated *information* service. The proper means of assuring competition in the retail market for information services is to ensure that all ISPs – whether ILEC

further below,[10] there is good reason to believe that the ILECs are likely to act anti-competitively in the provision of wholesale mass-market broadband telecommunications services in order to obtain a competitive advantage in the market for retail broadband Internet access services. In light of the above, the Commission plainly should define a separate market for wholesale mass-market broadband telecommunications services.

II. THE ILECs RETAIN SIGNIFICANT MARKET POWER IN THE MARKET FOR WHOLESALE MASS-MARKET BROADBAND TELECOMMUNICATIONS SERVICES

The Commission next asks whether the ILECs have market power in any relevant market. The Commission further inquires whether the ILECs' ability to act anti-competitively in that market is constrained by either intermodal or intramodal competition.[11] Finally, the Commission asks whether "current statutory and regulatory requirements" – especially the existing competitive safeguards contained in the Commission's *Computer Rules* and the wholesale provisions contained in Section 251(c) of the Communications Act – "limit the market power of incumbent LECs."[12]

As demonstrated below, ILECs plainly have the power to raise the costs that "downstream" rival ISPs incur by raising the cost of wholesale broadband telecommunications services that ISPs need to serve their mass-market subscribers. Neither the relatively small amount of competitive DSL services provided by "Data CLECs," nor the narrowband telecommunications services provided by ILECs and CLECs, nor the bundled retail services

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or non-ILEC affiliated – have non-discriminatory access to the underlying broadband telecommunications service on just, reasonable and non-discriminatory terms.

[10] *See, infra,* § II.A.

[11] *Notice* ¶¶ 26, 31.

[12] *Id.* ¶ 32.

offered by alternative broadband platform providers (such as cable, wireless, or satellite operators) provide a viable competitive alternative that can constrain the ILECs' ability to subject rival ISPs to a fatal "price squeeze" by restricting the output and/or raising the price of wholesale mass-market broadband telecommunications services. Nor is the ILECs' ability to leverage their market power to harm competition in the mass-market Internet access market constrained by the existence of statutory or regulatory provisions, such Section 251(c) (which is not applicable to ISPs) or the *Computer Rules* (which the Commission has significantly weakened and may eliminate).

A. The ILECs Have the Ability and Incentive to Increase the Cost of Wholesale Mass-Market Broadband Telecommunications Services

In the *Notice,* the Commission correctly observes that one indication of market power is the ability of a carrier "to raise prices by increasing its rivals' costs or by restricting its rivals' output through the carrier's control of an essential input . . . that its rivals need to offer their services."[13] The ILECs plainly have the ability to do just that.

There is no question that the ILECs are the dominant providers of DSL services. According to the recent *Third Advanced Services Deployment Report,* the ILECs currently provide approximately 93 percent of the DSL telecommunications lines.[14] The ILECs also are major participants in the "down-stream" market for broadband mass-market Internet access services. Because the ILECs' wholesale mass-market broadband telecommunications services are a significant input for mass-market broadband Internet access services, and because the ILECs compete directly against non-affiliated ISPs in the market for mass-market broadband

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[13] *Id.* ¶ 28.

[14] *See Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996,* Third Report, CC Docket No. 98-146, FCC 02-33, Chart 5 (rel. Feb. 6, 2002) ("*Third Advanced Services Deployment Report*").

Internet access services, if appropriate regulatory safeguards are removed, the ILECs will have both the ability and the incentive to provide wholesale mass-market broadband telecommunications services to non-affiliated ISPs on unreasonable and discriminatory prices, terms, and conditions, thereby subjecting rival ISPs to a classic "price squeeze."

Indeed, there is evidence that the ILECs have already leveraged their position as the dominant providers of DSL services to secure a dominant position in the market for wireline broadband Internet access services.[15] Today, the ILECs control an estimated 75 to 85 percent of the wireline broadband Internet access service market.[16] By contrast, in the narrowband Internet access market – where the Commission's pro-competitive safeguards have long required the ILECs to provide non-affiliated ISPs with reasonably priced, non-discriminatory access to the ILECs' narrowband telecommunications services – the ILECs have captured only about five to ten percent of the market.

The ILECs' incentive to act anti-competitively in the broadband Internet access market is likely to increase. Pursuant to Section 271 of the Communications Act, the BOCs cannot provide in-region inter-LATA services (including inter-LATA information services, such as end-to-end Internet access) in any state until the Commission grants authorization.[17] To date, the Commission has granted eight applications. This number is likely to increase significantly over the next 12 to 18 months. As the Commission grants more Section 271 applications – thereby

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[15]There is evidence that the ILECs have limited the ability of non-affiliated ISPs to offer competitive broadband services by declining to provide DSL service to ISPs in those cases in which the ISP seeks to serve a customer that does not also purchase an ILEC-provided voice telecommunication service. *See SBC-Arkansas/Missouri Section 271 Order,* 16 FCC Rcd at 20894 (separate statement of Commissioner Copps).

[16] *See* Ashdown, *Can America Compete with Bell Lobbying Armies*, INTERNET INDUSTRY MAGAZINE, Fall 2001, at 74-75 (estimating that the ILECs have between a 78 and 87 percent share of the market for wireline broadband Internet access services); *see also* Kraft, *The Coming DSL Debacle*, BUSINESS COMMUNICATIONS REVIEW, June 2001, at 7 (citing SBC's claim that it had signed up 80 percent of its DSL subscribers to its broadband Internet access service).

allowing the BOCs to become full participants in the information services market – the BOCs' incentive to use their position as the dominant provider of DSL services to strengthen their position in the market for broadband wireline Internet access services will only increase.

B. The ILECs' Market Power is Not Constrained by "Intra-Modal" Competition

The ability of ILECs to use their position as providers of wholesale mass-market broadband telecommunications services to subject non-affiliated ISPs to a price squeeze would be constrained if there were significant "intra-modal" competition. If an ISP had the ability to readily switch to comparable broadband telecommunications services provided by a CLEC, or to substitute narrowband telecommunications services – whether obtained from an ILEC or a CLEC – the ILEC would be unable to provide broadband telecommunications services to ISPs on unreasonable prices, terms, and conditions. Any attempt to do so would simply result in the ILEC losing money because ISPs would switch to an alternative provider and/or service. Unfortunately, however, most ISPs cannot feasibly switch to either CLEC-provided broadband services or narrowband telecommunication services.

1. Competition from "Data CLECs" is limited – and could be virtually eliminated if the ILECs succeed in the *Line Sharing* and *Collocation Remand Order* appeals

Competitive provision of DSL services has proven far more difficult than analysts anticipated. Two years ago, three major "Data CLECs" – Covad, NorthPoint, and Rhythms – seemed poised to rapidly gain a substantial share of the market. Today, two of those companies have completely ceased operations. The third, Covad, has just emerged from bankruptcy. Investment in this sector has declined precipitously. At present, only about seven percent of all DSL lines are provided by a CLEC. While ITAA continues to support the development of Data

[17] *See* 47 U.S.C. § 271 (b)(1).

CLECs, the current level of competition plainly is not sufficient to constrain ILECs' ability to act anti-competitively.

The primary explanation for the weakness of the CLEC sector is the concerted effort by ILECs to deny, delay, and degrade the provision of wholesale service to them. Like ISPs, CLECs remain critically dependent on inputs from ILECs – such as unbundled loops and collocation space – in order to provide service to their customers. The ILECs plainly have little incentive to be of assistance.

In response to the ILECs' anti-competitive practices, the Commission adopted two significant orders designed to ensure that CLECs have the opportunity to compete in the broadband telecommunications market. In the *Collocation Order,* the Commission adopted comprehensive rules requiring the ILECs to allow CLECs to locate various types of equipment necessary to provide competitive broadband services.[18] In the *Line Sharing Order,* the Commission required ILECs to permit Data CLECs to access the upper frequency spectrum on the same loops that the ILECs use to provide voice services – and to impute the same loop costs to this network element that the ILECs impute to their own retail DSL services.[19]

The ILECs have mounted a ferocious attack in the courts on the Commission's *Collocation* and *Line Sharing Orders.* The ILECs prevailed in the first of these challenges, obtaining a ruling in the D.C. Circuit that certain aspects of the *Collocation Order* exceeded the Commission's jurisdiction.[20] The ILECs have now filed a court challenge to the Commission's

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[18] *See Deployment of Wireline Services Offering Advanced Telecommunications Capability,* First Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 4761, 4773-74 (1999), *aff'd in part, and vacated and remanded in part sub nom. GTE Service Corp. v. FCC,* 205 F.3d 416 (D.C. Cir. 2000), *on recon.* 15 FCC Rcd 17806-39 (2000); *petitions for further recon. pending.*

[19] *See Deployment of Wireline Services Offering Advanced Telecommunications Capability,* Third Report and Order, 14 FCC Rcd 20912 (1999), *on reconsideration,* 16 FCC Rcd 2101 (2001).

[20] *See GTE Services Corp. v. FCC,* 205 F.3d 416 (D.C. Cir. 2000).

Collocation Remand Order – in which the Commission significantly reduced the ILECs' obligations in response to the D.C. Circuit's concerns.[21] That case, as well as the ILECs' appeal of the Commission's *Line Sharing Order,*[22] are likely to be decided later this year. A further victory by the ILECs would significantly undermine the ability of the Data CLECs to remain viable competitors – thereby depriving ISPs of a potentially significant "intra-modal" alternative to obtaining service from the ILECs.

Future actions by the Commission could further reduce the viability of Data CLECs as an alternative source of supply for the ISPs. The Commission has previously strictly limited the ILECs' obligation, pursuant to Section 251 of the Communications Act, to unbundle, and allow CLECs to access at cost-based prices, the digital subscriber loop access multiplexers and local packet networks that are necessary to provide competitive broadband transport services.[23] The Commission recently requested comments on the possibility of further restricting, or eliminating, CLEC unbundled access to these network elements.[24] The Commission is also considering a range of other changes to its rules, which would make it far more difficult for CLECs to obtain unbundled network elements from the ILECs.[25]

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[21] *See Verizon California v. FCC,* No. 01-1371 (D.C. Cir., filed Aug. 23, 2001).

[22] *See United States Telecom Ass'n v. FCC,* No. 00-1012 (D.C. Cir., filed Jan. 18, 2000).

[23] *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* Third Report and Order, 15 FCC Rcd 3696, 3833-34 (1999).

[24] *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* Notice of Proposed Rulemaking, CC Docket No. 01-338, FCC 01-361, ¶¶ 61-62 (rel. Dec. 20, 2001).

[25] *See, e.g., id.* ¶ 53 (seeking comments regarding the elimination of the ILECs' "line sharing" obligation); *see also Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities,* CC Docket No. 02-33, FCC 02-42, ¶ 61 (rel. Feb. 15, 2002) (*"Wireline Broadband Internet NPRM"*) (seeking comments on the obligation of ILECs to provide "line sharing" if an ILEC providing wireline broadband Internet access service over its own facilities is providing an information service).

The Commission has also initiated a proceeding to consider the regulatory obligations of ILECs that provide broadband Internet services over their own facilities. As part of this proceeding, the Commission will address whether the ILECs must continue to unbundle and make available under tariff the basic telecommunications services that underlie their broadband information service offerings.[26] If the Commission were to eliminate this obligation,[27] the ILECs could cease providing "stand alone" broadband services, such as DSL, to their retail customers. This, in turn, would enable the ILECs to cease to allow CLECs to obtain DSL services at wholesale rates, thereby precluding CLECs from reselling these services to ISPs.[28] The end-result would be to eliminate a constraint on the ILECs' ability to price wholesale mass-market broadband telecommunications services at super-competitive levels.

In light of all of the above, the Commission cannot rely on the existence of CLEC competition as an effective means to constrain the ILECs from providing ISPs with wholesale mass-market broadband telecommunications services on unreasonable and/or discriminatory prices, terms, and conditions.

2. Narrowband services are not a reasonable substitute for broadband

The Commission also cannot rely on the ability of ISPs to purchase narrowband telecommunications services – whether from the ILECs or CLECs – to constrain the ILECs' ability to act anti-competitively in the market for wholesale mass-market broadband

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[26] *See Wireline Broadband Internet NPRM* ¶ 43.

[27] The Commission first adopted the "transmission-at-tariff" obligation in the *Second Computer Inquiry*. *See Amendment of Section 64.702 of the Commission's Rules and Regulations* ("*Second Computer Inquiry*"), 77 FCC 2d. 384 (1980), *recon.*, 84 FCC 2d. 50 (1980), *further recon.*, 88 FCC 2d. 512 (1981), *aff'd sub nom. Computer and Communications Industry Association v. FCC,* 693 F.2d 198 (D.C. Cir. 1982), *cert. denied,* 461 U.S. 938 (1983) ("*Computer II Orders*").

[28] The Commission declined to find that the *Computer II* obligation was applicable in the *SBC-Arkansas/Missouri Section 271 Order*. *See* 16 FCC Rcd at 20759-60.

telecommunications services. By definition, an ISP must be able to access a broadband telecommunications service to provide a broadband Internet access service. Therefore, the ability of an ISP to purchase a *narrowband* telecommunications service will only constrain the ILECs' ability to act anti-competitively in the market for wholesale *broadband* mass-market telecommunications services if the ISP can readily switch from providing broadband to narrowband Internet access services to its customers. The ISP, in turn, can only do so if its subscribers view narrowband Internet access service as a substitute for broadband Internet access service.

In the *AOL Time Warner Merger Order*, the Commission concluded that consumers do not view narrowband Internet access service to be a substitute for broadband Internet access service.[29] The Commission provided significant support for this conclusion. First, the Commission noted, broadband Internet access services allow users to easily access applications – such as multimedia web sites and video-on-demand services – that are often difficult to access using narrowband Internet access services.[30] Second, the Commission observed that the costs to switch from narrowband to broadband services are significantly higher than the costs to switch between narrowband services.[31] There is no basis for the Commission to depart from the conclusion that it reached in the *AOL Time Warner Merger Order*. If anything, the differences between the narrowband and broadband Internet access experiences have increased since the

[29] *Notice* ¶ 26 (The Commission "has previously identified the high-speed [Internet] access product market as separate from the low-speed market." (citing *Application for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner, Inc. Transferee,* 16 FCC Rcd 6547, 6568 (2000)("*AOL Time Warner Merger Order*")).

[30] *AOL Time Warner Merger Order,* 16 FCC Rcd at 6555.

[31] *Id.* at 6555-56.

Commission made its determination as the result of the introduction of numerous new "bandwidth-intensive" applications.

Because consumers do not view narrowband Internet access services as substitutes for broadband Internet access services, ISPs cannot readily switch from purchasing broadband to narrowband wholesale transport services. Therefore, the existence of narrowband wholesale telecommunications services does not constrain the ILECs' ability to provide broadband wholesale services on unreasonable prices, terms, and conditions.

C. The ILECs' Market Power is Not Constrained by "Inter-Modal" Competition

Even if the ILECs' ability to act anti-competitively in the market for wholesale mass-market broadband telecommunications services is not constrained by inter-modal competition, the ILECs' ability to subject rival ISPs to a price squeeze (or impose other competitive harms) would still be constrained if the ILECs were subject to significant "inter-modal" competition. Unfortunately, here again, market forces are not adequate to constrain ILEC anti-competitive conduct.

1. Cable system operators do not provide wholesale broadband transport services

There is no doubt that, at the present time, far more residential customers obtain broadband Internet access service from cable-based ISPs than from wireline-based ISPs.[32] The relevant question, however, is whether the existence of *retail* cable-based Internet access services constrains the ability of the ILECs to act anti-competitively in the *wholesale* broadband telecommunications market. The answer, quite simply, is that it does not.

[32] *See Third Advanced Services Deployment Report* ¶ 100.

The Commission has repeatedly rejected proposals to require cable operators to provide unaffiliated ISPs with access to cable networks on nondiscriminatory terms and conditions. Efforts by some localities to do so have been found to be unlawful.[33] As a result, an ISP that is unable to obtain wholesale broadband telecommunications services from an ILEC at a reasonable price cannot obtain a substitute service from a cable system operator. At most, the ISP may be able to negotiate a commercial agreement to "partner" with the cable system operator. While the Commission has initiated an Inquiry to consider the obligation of cable system operators to provide "open access," there seems little likelihood that the Commission will depart from its policy of "regulatory restraint."[34]

2. Broadband satellite and wireless providers are not yet viable competitive alternatives

In addition to wireline and cable networks, satellite and terrestrial wireless networks are increasingly being used to deliver broadband Internet access services. However, at the present time, these networks account for only a minute share of the retail broadband market. While the Commission's recent *Third Advanced Services Deployment Report* found that there are now 2.7 million DSL lines in service, it found only about 200,000 high-speed satellite and terrestrial lines in service.[35] Because these providers are still in the early stages of development, they cannot realistically be expected to act as an effective competitive "check" on ILEC anti-competitive

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[33] *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities,* Notice of Inquiry, 15 FCC Rcd 19287, 19291-93 (2000) (*"Cable Internet NOI"*). Indeed, at the present time, only one cable system (AOL Time Warner) is under any legal obligation to cooperate with non-affiliated ISPs. Even AOL Time Warner, however, is not subject to a general requirement to provide a wholesale broadband transport service available to any ISP. Rather, pursuant to a consent decree with the Federal Trade Commission, and consistent with the Commission's order approving the necessary transfers of control, AOL Time Warner has entered into agreements with three nonaffiliated ISPs in which AOL Time Warner and the ISP jointly provide a high-speed Internet access service to retail customers. *See also AOL Time Warner Merger Order,* 16 FCC Rcd at 6568-69.

[34] *Cable Internet NOI,* 15 FCC Rcd at 19291.

[35] *See Third Advanced Telecommunications Services Deployment Report,* ¶¶ 49, 55, 60 n. 127.

abuse. Moreover, even if – as expected – this sector grows significantly in the coming years, satellite and wireless providers, like cable operators, are not under an obligation to "open" their networks to non-affiliated ISPs. As a result, like cable operators, they may choose to partner with select ISPs in order to provide a bundled retail offering – rather than provide a generally available wholesale transport service that ISPs can use to access their subscribers.

D. Existing Regulatory Regimes do Not Compensate for the Lack of Competitive Alternatives

In some cases, it may be possible for a comprehensive regulatory regime to compensate, to a reasonable extent, for the lack of competition in a particular market. However, the two bodies of regulation mentioned in the *Notice* – the Section 251 unbundling obligations and the competitive safeguards that the Commission adopted in the *Computer Inquiries* – plainly are not sufficient to prevent the BOCs from engaging in anti-competitive conduct in the market for wholesale mass-market broadband telecommunications services.

1. Section 251 unbundling obligations do not increase ISPs' competitive alternatives

Section 251 provides *CLECs* with the ability to purchase unbundled network elements from the ILECs at cost-based prices. This provision, however, does not provide *ISPs* with the right to acquire these elements. Therefore, the only way in which Section 251 is relevant to ISPs is that it facilitates the growth of CLEC competition – which provides ISPs with an alternative to the ILECs' services. While ITAA has long supported the growth of the CLEC sector, as discussed above, ITAA does not believe that CLECs can now – or in the future will be able to – fully meet the needs of ISPs for broadband telecommunications services. This will be especially true if the Commission restricts CLECs' Section 251 rights. Therefore, the Commission cannot

rely on the Section 251 regime as an effective constraint against ILEC anti-competitive abuse in the wholesale mass-market broadband telecommunications services market.[36]

2. The Commission has weakened – and may entirely eliminate – the *Computer Rules*

The Commission also cannot rely on the pro-competitive safeguards adopted in the *Computer Inquiries* to prevent the ILECs from using their market power to thwart competition in the broadband information services market. The Commission has repeatedly weakened these safeguards – and, in a separate proceeding, is considering eliminating many of them entirely.

a. The Commission's Weakening of the *Computer Rules*

The Commission adopted the *Computer Rules* to prevent the BOCs from using their control over the local exchange network to impede competition in the adjacent markets for information services and customer premises equipment. The Commission recognized that the BOCs could do so in at least two distinct ways. First, BOCs could impede competition by using revenues from non-competitive telecommunications services to cross-subsidize their competitive information service offerings. And, second, BOCs could undermine competition by providing access to the telecommunications facilities and services that competing ISPs require on discriminatory prices, terms, and conditions.[37] The Commission therefore adopted a series of

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[36] While ITAA has opposed proposals to give ISPs "carrier-like" Section 251 rights, ITAA has previously suggested that the Commission give ISPs a limited right to purchase specified features and functions of the ILECs' networks that can be used to provide information services, on an unbundled basis, at just and reasonable prices. Specifically: (1) the right to physically collocate ISP-provided equipment in the ILECs' central offices; (2) the ability to obtain unbundled switching and transmission links; (3) the right to "interposition" ISP-provided equipment between an end user's CPE and an ILEC's central office; and (4) direct access to remote line concentration equipment, which is required to efficiently provide service to geographically concentrated groups of customers. *See* Comments of the Information Technology Association of America in response to *Further Comment Requested to Update and Refresh Record on Computer III Requirements,* Public Notice, DA 01-620 (Mar. 7, 2001), 66 Fed. Reg. 15,064 (2001) (Apr. 16, 2001) (citing Comments of ADAPSO, *Filing and Review of Open Network Architecture Plans*, CS Docket No. 95-20 at 52-53 (Apr. 18, 1988)).

[37] *See Computer II Order,* 77 FCC 2d. at 463-64.

competitive safeguards designed to prevent the BOCs from engaging in these forms of anti-competitive conduct.

Over the years, the Commission has taken a number of steps that have weakened the effectiveness of the *Computer Rules* as a means of constraining the BOCs' ability to leverage their market power in the telecommunications market in a manner that can impede competition in the information services market. These include the elimination of structural separation, the dilution of the ONA requirement, and the elimination of the requirement that the BOCs obtain prior approval for Comparably Efficient Interconnection ("CEI") Plans.

Elimination of structural separation. In the *Second Computer Inquiry*, initiated in 1979, the Commission concluded that the pre-divestiture AT&T could provide information services (which the Commission then referred to as "enhanced services"). In order to prevent AT&T from using the monopoly that its BOCs then possessed in the local telecommunications market to impede competition in the adjacent information services market, the Commission required AT&T to provide information services through an affiliate that was separate from the BOCs.[38] In reaching this decision, the Commission emphasized that accounting and behavioral safeguards alone would not be sufficient to deter cross-subsidization and discrimination.[39] Four years later, on the eve of the AT&T Divestiture, the Commission ruled that, to the extent the Divestiture Decree permitted the divested BOCs to provide information services, the *Computer II* structural separation requirements would apply. Once again, the Commission made clear that

[38] *See Second Computer Inquiry*, 77 FCC 2d. 384 (1980)("*Computer II Final Order*"), *on recon.*, 84 FCC 2d. 50, 53 (1980), *further recon.*, 88 FCC 2d. 512 (1981), *aff'd sub nom. Computer & Communications Indus. Ass'n v. FCC*, 693 F.2d 198, 205 n.18 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983).

[39] *Computer II Final Order*, 77 FCC 2d. at 463-64.

structural separation is the only viable means of deterring the BOCs from using their local exchange monopolies to dominate the market for enhanced services.[40]

In the *Third Computer Inquiry*, initiated in 1986, the Commission changed its views. The agency found that it could lift the structural separation requirement, provided the BOCs adopted strong non-structural safeguards – especially the obligation to develop an effective ONA Plan and, in the interim, to file service-specific CEI Plans that specify the means by which the BOC will make available on a non-discriminatory basis the basic telecommunication service that underlies each of the BOC's information service offerings.[41]

Despite the fact that the Ninth Circuit has *twice* rejected the Commission's efforts to eliminate structural separation,[42] during the last fifteen years the Commission has allowed the BOCs to provide telecommunications and information services on an "integrated" basis – while eviscerating ONA and effectively abolishing the CEI Plan requirement.

The "dilution" of Open Network Architecture. In the original *Computer III Order,* the Commission asserted that, by requiring the BOCs to "fundamentally unbundle" their networks, ONA would serve as a "self-enforcing" means of preventing BOCs from discriminating against rival ISPs that require access to the BOCs' telecommunications services, while allowing independent ISPs to make new and innovative uses of the existing monopoly networks.[43] ONA,

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[40] *Policy and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services and Cellular Communications Services by the Bell Operating Companies*, 95 FCC 2d. 1117, 1125-39 (1983) ("The separate organization requirement should alleviate most concerns about anti-competitive practices by the BOCs against suppliers of enhanced services since the BOCs would enter, if at all, on the same terms and conditions as other suppliers.").

[41] *See Amendment of Section 64.702 of the Commission's Rules and Regulations*, Report and Order, 104 FCC 2d. 958 (1986), *recon.* 2 FCC Rcd 3038 (1987), *further recon.* 3 FCC Rcd 1135 (1988), *second further recon.* 4 FCC Rcd 5927 (1989), *vacated California v. FCC*, 905 F.2d 1217 (9th Cir. 1990).

[42] *See California Public Utilities Commission v. FCC,* 39 F.3d 919 (9th Cir. 1994) (*"California III"*); *California Public Utilities Commission v. FCC*, 905 F.2d 1217 (9th Cir. 1990) (*"California I"*).

[43] *Computer III Order,* 104 FCC 2d. at 1063-64.

however, has failed to come anywhere close to achieving these goals. There are two reasons for this. First, the Commission failed to require the BOCs to fundamentally unbundle their network – instead allowing the BOCs to repack existing services under new names. And, second, the Commission insisted that any ISP that wants to purchase ONA Basic Service Elements pay above-cost, per-minute carrier access charges. As a result, in *California III*, the Ninth Circuit concluded that the Commission had failed to adequately explain how, given its subsequent decision to "dilute" ONA by eliminating the fundamental unbundling requirement, ONA remains an effective means of preventing access discrimination.[44] Nearly *eight* years later, the Commission has yet to adopt an order responding to this remand.

Elimination of prior CEI plan approval. The Commission has also eviscerated the CEI Plan requirement. In an order released in March 1999, the Commission ruled that the BOCs are no longer required to file and obtain advanced Commission approval of their CEI Plans.[45] Instead, the BOCs need merely post a copy of their plans on their websites. ISPs that believe that the BOCs are not in compliance with the substitutive CEI requirement must file a formal after-the-fact complaint with the Commission.[46]

This procedure is significantly less effective than the safeguards established in *Computer III.* Previously, a BOC that wanted to provide basic telecommunications and information services on an integrated basis had an affirmative obligation to demonstrate that it would not engage in access discrimination. ISPs and other interested parties had an opportunity to review the submission and to file comments that raised questions and pointed out any obvious

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[44] *California III,* 39 F.3d at 930.

[45] *See Computer III Further Remand First Report and Order,* 14 FCC Rcd at 4290.

[46] *Id.* at 4297-4305.

deficiencies before the BOC could provide the service. The knowledge that the Commission would rigorously review the BOCs' submissions and the public comments doubtless served as a potent deterrent to BOC abuse. The end-result was to prevent discrimination *before* it happened.

Today, by contrast, a BOC can offer information services on an integrated basis without any opportunity for prior public or Commission review. If, after the service has been introduced, an ISP believes that a BOC is engaging in discriminatory conduct, it must comply with the time-consuming procedures applicable to formal complaints. This entails gathering information to document the discrimination and seeking to negotiate a voluntary settlement with the BOC. If this effort is not successful, the ISP must prepare a detailed complaint and must participate in the Commission's often-protracted adjudicatory process. This process is likely to deter all but the largest ISPs from challenging the BOCs' actions. Moreover, even if a challenge is brought, during the pendancy of the adjudicatory process, the BOC's discrimination generally will continue unchecked.

Authorization of price bundling. While the Ninth Circuit's *California III* decision found that the Commission has not demonstrated that it was effective in preventing BOCs from providing competing ISPs with discriminatory access to basic telecommunications services, the court did find the Commission's non-structural safeguards to be adequate to deter the BOCs from using revenue from non-competitive telecommunications services to cross-subsidize their information service offerings.[47] However, the Commission's subsequent decision to allow the BOCs and other dominant ILECs to bundle telecommunications services with separate information services plainly increases the risk of cross-subsidization.

[47] *See California III,* 39 F.3d at 926.

The Commission's prohibition on information services bundling had its origin in *Computer II.* For more than twenty years, most industry participants believed that this prohibition barred a BOC from offering single-price "packages" that included a basic telecommunications service (such as local exchange) and a *separate* information service (such as voicemail or DSL-based Internet access). (This practice is sometimes referred to as "price bundling.") In a recent order, however, the Commission granted the BOCs' request and "clarified" that the prohibition on information service bundling does not prohibit price bundling.[48]

The increasing use of price bundling will plainly create new opportunities for the BOCs to use revenues from their non-competitive basic telecommunications offerings cross-subsidize their information services. In many cases, a BOC will be able to "cover-up" these abuses by claiming it is able to offer the package for a price that is lower than the sum of the prices for the separate components as a result of alleged "efficiencies" resulting from the bundling.

b. Possible Elimination of the *Computer Rules*

Given the significant weakening of the safeguards adopted in the *Computer Inquiries,* the *current* rules do not provide an adequate safeguard against BOC anti-competitive conduct in the provision of telecommunications services, whether narrowband or broadband. The Commission, moreover, is considering whether to further "dilute" – if not eliminate – the *Computer Rules.* As the *Notice* acknowledges, this could occur in either of two proceedings.[49] First, in the *Computer III Further Remand Proceeding*, initiated in response to the Ninth Circuit's 1994 vacation of

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[48] *See Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Report and Order, 16 FCC Rcd 7418, 7443-44 (2001).

[49] *See Notice* ¶ 5 n.9 ("The continued need for [the *Computer Rules*] is currently being examined in [the *Computer III Further Remand*] proceeding."); *id.* ¶ 43 n.95 ("Comments regarding the applicability of Computer II/III safeguards to incumbent ILEC broadband service, or regarding modification to those safeguards, should be addressed in the Commission's forthcoming Broadband proceeding.").

most of the Commission's *Computer III Remand Order*, the Commission has sought to eliminate permanently the BOCs' obligation to provide information services through a structurally separate affiliate.[50] Second, in the recently issued *Broadband Internet Access Notice*, the Commission asks whether, at least as applied to ILEC broadband telecommunications services, "the *Computer Inquiry* requirements should be modified or eliminated."[51] Specifically, the Commission has sought comment regarding the continued application to ILEC broadband services of: (1) the ONA requirement; (2) the CEI requirements; and (3) the remaining requirement that the ILECs provide customers with the option of purchasing, on a stand-alone basis, the basic telecommunications services that underlie their information service offerings, such as Internet access service.[52]

The Commission cannot rely on the existence of the *Computer Rules* as a constraint on the ILECs' anti-competitive conduct in this proceeding, while taking steps to further weaken or eliminate those rules in other proceedings.

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[50] *See Computer III Further Remand Proceedings: Bell Operating Company Provision of Advanced Services,* Further Notice of Proposed Rulemaking, 13 FCC Rcd 6040 (1998); *Further Comments Requested to Updated and Refresh Record on Computer III Requirements,* Public Notice, 16 FCC Rcd 5363 (2001). Prior to the adoption of the Telecommunications Act, the Commission's Computer Rules governed the BOCs' provision of information services. However, after February 8, 1996 – when Section 272(a)(2)(C) of the Communications Act became effective – the BOCs were required to provide inter-LATA information services through a separate affiliate, while the Commission's Computer Rules continued to govern BOC provision of in-region, intra-LATA information services. The Commission allowed Section 272(a)(2)(C) to sunset on February 8, 2000. *See Request for Extension of the Sunset Date of the Structural, Nondiscrimination, and Other Behavioral Safeguards Governing Bell Operating Company Provision of In-Region, InterLATA Information Services,* CC Docket No. 96-149 (Feb. 8, 2000). The Commission has recognized that "*Computer II, Computer III,* and *ONA* requirements continue to govern BOC provision of these [information] services, to the extent that these requirements are consistent with the 1996 Act." *Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as amended,* 11 FCC Rcd 21905, 21968 (1996). As a result of the sunset of Section 272(a)(2)(C), the Communications Act contains no provision that addresses the safeguards applicable to BOC provision of inter-LATA information services. Therefore, since February 8, 2000, the Commission's Computer Rules have again governed BOC provision of inter-LATA (as well as intra-LATA) information services.

[51] *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities,* Notice of Proposed Rulemaking, CC Docket No. 02-33, FCC 02-42, ¶ 43 (rel. Feb. 15, 2002).

[52] *See id.* ¶¶ 43-53.

III. THE COMMISSION SHOULD NOT DECLARE THE ILECs NON-DOMINANT IN THE PROVISION OF WHOLESALE MASS-MARKET BROADBAND TELECOMMUNICATIONS SERVICES

In the final section of the *Notice,* the Commission asks whether to reclassify the ILECs as non-dominant in the provision of broadband telecommunications services and, if so, "what regulatory requirements, if any, should govern the [ILECs'] provision of broadband services."[53] Because the ILECs continue to have the ability and incentive to discriminate in the provision of wholesale mass-market broadband telecommunications services, it would not be appropriate to reclassify them as non-dominant or to eliminate existing regulations applicable to these services. Rather, the Commission should enforce existing regulations – especially the BOCs' still-effective *Computer II* obligation to separate the provision of intra-LATA telecommunications services (both narrowband and broadband) from the provision of information services. If the Commission chooses to deregulate the ILECs' broadband telecommunications services, however, it should, at the very least, require the ILECs to establish structurally separate "advanced services" affiliates that would be required to access the ILECs' local networks on the same prices, terms, and conditions as unaffiliated CLECs that seek to provide competitive broadband telecommunications services.

A. Promoting Competition – Not Wholesale Deregulation – is the Most Effective Means to Foster Broadband Deployment

The *Notice* asks a remarkable question: would "reduced regulation of services provided by incumbent LECs, *regardless of the extent of existing competition* . . . foster competition and the deployment of broadband facilities used in the provision of these services"?[54] ITAA has consistently supported the elimination (or non-imposition) of regulation in situations in which

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[53] *Notice* ¶ 33.

[54] *Id.* ¶ 39 (emphasis added).

competitive market forces are operating effectively. However, ITAA disagrees strongly with the suggestion that the best means to promote broadband deployment is to eliminate regulation designed to prevent the ILECs from leveraging their market power resulting from their historic monopoly control over the local network into broadband telecommunications and information services markets.

As an initial matter, there is little need for the Commission to take radical action to promote broadband deployment. Competitive forces have resulted in the deployment of significant broadband capacity in most geographic areas. Indeed, in most locations, there is significantly more broadband supply than demand. While high speed Internet service is available to approximately 86 million U.S. households, only about 11.5 million homes (11 percent) subscribe to any type of broadband service. By contrast, more than 61 million households have narrowband (dial-up) Internet access.[55] There is, therefore, little need for the Commission to dismantle existing regulatory provisions designed to promote competition in order to create "incentives" for ILEC deployment. Rather, the Commission's principal goals should be to continue to foster competition, while taking actions that will spur consumer demand for broadband services.[56]

In any case, a "deregulation first" approach plainly would be inconsistent with congressional intent. To be sure, Section 706 of the Telecommunications Act, which directs the Commission to take appropriate action to promote broadband deployment, provides for the use

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[55] *See* Information Technology Association of America, *Positively Broadband: Building a Positive, Competitive Broadband Agenda,* at 8 (Oct. 2001) *available at* http://www.positivelybroadband.org.

[56] The Commission can foster demand by increasing use of "e-government" services, facilitating schools' and libraries' access to on-line educational services, promoting efficient use of spectrum, fostering uniform national rules and policies, and contributing to appropriate law enforcement, consumer protection and disability access initiatives. *See id.* at 18-22.

of deregulation and forbearance.[57] Congress, however, plainly intended that the Commission only use these tools *after* competition had taken root. Thus, Section 11 of the Communications Act provides that the Commission must determine that a regulation is no longer necessary in the public interest as the result of meaningful economic competition between service providers *before* exercising its forbearance power.[58] Similarly, in Section 271 of the Act, Congress provided that the BOCs must open their local networks to competition *before* they are permitted to enter the market for in-region, inter-LATA services – and, even then, must do so through a strong separate affiliate designed to deter anti-competitive abuse.[59]

The "competition first" approach adopted by Congress has proven to be correct. Indeed, the Commission has recognized repeatedly that it is the growth of competition – not premature deregulation – that has spurred the growth of broadband deployment. As the Commission found in the *Second Advanced Telecommunications Services Deployment Report,* a significant "factor spurring the rise in investment [in infrastructure since 1996] appears to be the introduction of competition into the telecommunications market."[60] The "tremendous investment in DSL deployment," the Commission added, was "spurred tremendously" by the Commission's regulatory policies regarding the "availability of unbundled network elements and line sharing."[61] More recently, in the *Third Advanced Telecommunications Services Deployment*

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[57] *See* 47 U.S.C. § 706.

[58] *Id.* at § 161(a)(2).

[59] *Id.* at § 271.

[60] *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996,* Second Report, 15 FCC Rcd 20913, 20983 (2000).

[61] *Id.* at 20988.

Report, the Commission re-affirmed that its collocation and "line sharing" rules are intended to "promot[e] investment through competition."[62]

Consistent with congressional policy, and its own precedent, the proper course of action for the Commission is to continue to vigorously enforce its rules intended to foster competitive entry into the broadband market by CLECs and other providers – not to eliminate existing regulation in the hope that, free to do as they please, dominant operators will choose to deploy additional broadband facilities.

B. The Commission Should Not Alter the Existing Regulatory Requirements Applicable to ILEC Wholesale Mass-Market Broadband Telecommunications Services

Until such time as ISPs have a meaningful choice regarding the providers of wholesale mass-market broadband telecommunications services, the Commission must continue to treat the ILECs as dominant in the provision of these offerings. As dominant carriers, ILECs must continue to comply with the fundamental Title II obligations that are necessary to prevent ILECs from using their market power in the telecommunications market in a manner that will impede competition in the Internet access market. This includes the duty to file tariffs and comply with effective price regulation.

C. The Commission Should Enforce Existing Regulations – Especially the Still-Effective *Computer II* Structural Separation Requirement

The Commission asks what impact a declaration of non-dominance should have on a carrier's obligations under *Computer II/III.*[63] Because the Commission should not reclassify the ILECs as non-dominant in the provision of broadband services used to provide information services, there is no justification for altering the applicability of the *Computer Rules* to the

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[62] *Third Advanced Services Deployment Report,* ¶¶ 136-37.

[63] *Notice* ¶ 43.

ILECs' broadband telecommunications services. To the contrary, as ITAA has previously asserted, the proper course for the Commission is to enforce the still-effective *Computer II* structural separation requirement.[64] These rules require the BOCs to separate the provision of telecommunications services (whether narrowband or broadband) from the provision of information services. Structural separation, coupled with appropriate price regulation of non-competitive ILEC basic telecommunications services, is the most effective way to deter ILEC anti-competitive abuse in the information services market. As the Commission recognized nearly two decades ago:

> [A]ccounting safeguards alone cannot provide the public as much protection against improper cost shifting as structural separation can. With separate structure, the existence of joint and common operations is limited, reducing the opportunities to shift costs. In addition, separate structure increases the delectability of any cross-subsidization that does occur... The separate organization requirement [also] should alleviate most concerns about anti-competitive practices by the BOCs against suppliers of enhanced

[64] As ITAA has repeatedly noted (*see, e.g.,* Comments of the Information Technology Association of America, *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services*, CC Docket No. 95-20, at 4-6 (April 16, 2001); Comments of the Information Technology Association of America, *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services*, CC Docket No. 95-20 (Mar. 27, 1998)), the Commission has fundamentally misconstrued the Ninth Circuit's decision in *California III*. In that case, the court considered three issues: (1) the legality of the Commission's decision, in the *Computer III Remand Order*, to replace the structural safeguards of *Computer II* – which the Commission had previously determined were necessary to deter BOC cross-subsidization and access discrimination – with nonstructural safeguards; (2) the legality of the Commission's revised rules governing the use of Customer Proprietary Network Information; and (3) the legality of Commission's decision to preempt certain State regulations. In its decision, the court held that, while the Commission had adequately demonstrated that non-structural safeguards were adequate to deter BOC cross-subsidization, the:

> FCC has failed to explain or justify its change in policy regarding nonstructural safeguards against access discrimination. For this reason, . . . that portion of [the FCC's] order is arbitrary and capricious. We uphold those portions of the *Order on Remand* that implement CPNI rules and that preempt state regulations.

California III, 39 F.3d at 930. As was the case after *California I*, when the court found that the Commission had not adequately justified its initial decision to lift standard separation, the effect of *California III* was to return the Commission to the *Computer II* structural separation regime. *See Bell Operating Companies' Joint Petition for Waiver of Computer II Rules*, 5 FCC Rcd 4714, 4714 (Com. Car. Bur. 1990) (recognizing that *California I* returned the Commission to the *Computer II* regime). The *only* portions of the *Computer III Remand Order* that were not vacated were those dealing with CPNI and preemption. Thus, the Commission's structural separation requirement remains legally in effect, notwithstanding the Commission's failure to enforce it.

> services . . . . If a BOC's separate entity is required to obtain access to the network in the same fashion as would a competing supplier, the provision of inferior access to a BOC rival would be much easier to detect.[65]

D. If the Commission Deregulates the ILECs' Broadband Services, It Should Require the ILECs to Establish a Fully Separate "Advanced Services Affiliate"

For the reasons set forth above, ITAA strongly opposes any proposal that would result in the reclassification of ILECs as non-dominant in the provision of wholesale mass-market broadband telecommunications services. If, however, the Commission were to reclassify the ILECs as non-dominant, it should – at the very least – require ILECs to provide advanced telecommunications services through separate affiliates. The Commission should further require the ILECs' advanced services affiliates to obtain inputs – such as access to loops and collocation – from the ILECs on the same prices, terms, and conditions as unaffiliated CLECs that seek to provide competitive broadband telecommunications services.[66] This approach would not be difficult to implement. Indeed, as the *Notice* recognizes, some ILECs have already adopted a form of structural separation.[67]

The Commission has previously recognized that requiring the ILECs to provide "advanced telecommunications services" through a separate affiliate can be an effective means to deter competitive abuse. For that reason, in the order approving the merger of SBC and Ameritech, the Commission required that the merged company "provide all Advanced Services in the SBC/Ameritech Service Area through one or more affiliates that are structurally separate

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[65] *Policy and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services and Cellular Communications Services by the Bell Operating Companies*, Report and Order, 95 FCC 2d. 1117, 1125-39 (1983).

[66] Consistent with the decision of the D.C. Circuit in *Association of Communications Enterprises v. FCC*, 235 F.3d 662 (D.C. Cir. 2001), the advanced services separate affiliate would remain subject to the unbundling and resale requirements specified in Section 251 of the Communications Act.

[67] *See Notice* ¶ 43.

from the SBC/Ameritech LECs."[68] The Commission stated that the establishment of an "advanced services separate affiliate will provide a structural mechanism to ensure that competing providers of advanced services receive effective, nondiscriminatory access to facilities and services of the [incumbent LEC] that are necessary to provide advanced services."[69]

The imposition of an advanced services affiliate requirement would limit, although not totally eliminate, the ability of the ILECs to leverage their control over the local exchange into the market for broadband telecommunications services and, ultimately, into the market for broadband information services. In order to be effective, however, the separate affiliate would need to comply with strict separation rules. Rather than extending the rules that the Commission applied to SBC/Ameritech, the Commission should apply the stricter separation rules specified by Congress in Section 272 of the Communications Act.

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[68] *Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer Control of Corporations Holding Communications Licenses and Lines Pursuant to Sections 214 and 310 (d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules*, Memorandum Opinion and Order, 14 FCC Rcd 14712, 14969 (1999) ("*SBC/Ameritech Merger Order*").

[69] *Id.* at 14859.

CONCLUSION

For the foregoing reasons, the Commission should continue to classify ILECs as dominant in the provision of wholesale mass-market broadband telecommunications services. Rather than eliminating existing regulations, the Commission should take action to promote competitive entry by Data CLECs, while enforcing the still-effective *Computer II* requirement that the BOCs separate the provision of telecommunications services (both narrowband and broadband) from the provision of information services. If the Commission chooses to deregulate the ILECs' broadband services, however, it should, at the very least, require the ILECs to provide "advanced telecommunications services" through an affiliate that is structurally separate from their local exchange service operations.

Respectfully submitted,

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